ISSN 1712-4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

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September 2012

New Vice Chair

The Board is pleased to welcome **Matthew Wilson** as a full-time Vice-Chair. Matthew was Legal Counsel at Lakeridge Health Corporation and Rouge Valley Health System. He regularly appeared before labour arbitrators and other statutory tribunals. In addition to having an LL.B. from the University of Western Ontario, he has a Master's Degree in Industrial Relations from Queen's University and a Master's Degree in Law from Osgoode Hall, and is also the co-editor of *Evidence and Procedure in Canadian Labour Arbitration*.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in August of this year. These decisions will appear in the July/August issue of the OLRB Reports. The full text of recent OLRB decisions is now available on–line through the Canadian Legal Information Institute at www.canlii.org.

Bargaining Rights – Bargaining Unit – *Public Sector Labour Relations Transition Act* – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s. 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will

come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE; OLRB File No. 0144-09-PS; Dated August 30, 2012; Panel: Ian Anderson (14 pages)

Certification – Parties – Reconsideration – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA; OLRB File No. 0955-11-R; Dated August 31, 2012; Panel: Bernard Fishbein, P. LeMay and C. Phillips (26 pages)

Duty of Fair Representation – Remedies – Among other complaints the applicant alleged that her union failed to advise employees as part of the ratification process that the employer had given notice during collective bargaining of its intention to revert to the strict language of the collective agreement with respect to an article in the collective agreement addressing entitlement to work at home – The article required employees to request prior approval, although the employer had been allowing employees, such as the complainant, to work from home for some time without seeking prior approval – The employer did advise the union that it intended to strictly enforce the work at home article, however during the

course of two ratification procedures the union did not advise the employees of the notice given by the employer – The Board found that this was not a case of an inadvertent mistake having been made in the material circulated during the ratification process, but rather a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process – The Board found the failure of the union to advise employees that the employer was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflected a complete disregard for the critical consequences to employees and undermined the statutory purpose of requiring ratification votes, and accordingly the failure was arbitrary and a breach of s. 74 – Concerning remedy the Board found that the complainant lost the opportunity to discuss the matter with fellow employees, which may or may not have gotten the issue back to the bargaining table and may or may not have resulted in some change – The Board advised the parties that it saw this as a mere loss of opportunity which will only attract nominal damages and remained seized to address damages if the parties could not agree on the quantum – Declaration made; Application granted in part

GAIL MYLES; RE ALLIANCE EMPLOYEES UNION (AEU); RE UNION OF NATIONAL EMPLOYEES; OLRB File No. 2296-11-U; Dated August 23, 2012; Panel: Larry Steinberg (15 pages)

Collective Agreement – Construction Industry Grievance – The Union filed grievances claiming that the employer had violated the collective agreement by failing to transfer two grievors closer to their regular residences – The issue before the Board was the interpretation of Article 802 C of the collective agreement which states that 'The Employer will make every reasonable effort to transfer employees as near as possible to their regular residences as work permits' – The Union argued that there was plenty of work available in the requested zone and that the employer failed to make 'every reasonable effort' to transfer W and A closer to their respective regular residences – The employer argued that the words 'as work permits' means that the employer only has to make every reasonable effort if there is a lack of work in the zone the employee is transferring from and there is work available in the requested zone – The employer submitted that at the time of the request, they had lost experienced workers and could not afford to transfer out any workers – The Board held that Article 802 C of the collective agreement includes not only an assessment by the employer of available work in the requested zone, but also the amount of work in the zone from which the transfer would be made – The Board dismissed A's grievance on the basis that a verbal request for a transfer is insufficient to engage Article 802 C – The Board dismissed W's grievance on the basis that it was not possible for the employer to accommodate a transfer as it had very recently experienced the loss of a number of journeyman electricians in the zone from which A wished to transfer – Grievances dismissed

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS; OLRB File No. 2698-11-G and 3145-11-G; Dated August 15, 2012; Panel: Gail Misra (13 pages)

Certification – Interim Relief – Practice and Procedure – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON

SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506; OLRB File No. 1284-12-M; Dated August 9, 2012; Panel: John D. Lewis (20 pages)

Employment Standards – The employer, which provides manure transporting and spreading services to farms, took the position that it was exempt from the overtime and maximum hours provisions in the Act, in that it met the requirements prescribed in s. 2(2) of O Reg 285/01 which exempts farmers from those sections – The Board noted that in order to meet the requirements of the Regulation the employer's employees must be "employed on a farm" and their employment must be "directly related to the primary production" of one or more of a number of farming categories – Although noting that the employees did not have a direct employment relationship with the farmer, the Board did not decide whether the employees were employed on a farm, given its conclusion that the employer was not involved in the primary production of farming – The Board found that Organix's work did not involve direct contact with any of the agricultural products listed in the regulation; it did not seed, tend, grow or harvest an agricultural product; and it collected and moved manure and prepared soil so that others may engage in the primary production of agricultural products – The Board found Organix's work to be ancillary to the primary production of farm produce – Compliance order confirmed

ORGANIX MATTERS INC.; RE DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1718-11-ES; Dated August 27, 2012; Panel: Kelly Waddingham (5 pages)

Build-Up – Certification – Fraud – Intervenor – Reconsideration – Termination –Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113; OLRB File No. 3396-11-R, 3792-11-U and 3795-11-R; Dated August 9, 2012; Panel: Patrick Kelly (10 Pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	Pending
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Pending
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	Pending
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al (Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Pending
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	Pending
Alliance Environmental Divisional Court No. 200/12	0854-10-R	October 15, 2012
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894–09–G	Pending
Swift Railroad Contractors Divisional Court No. 400/11	0039–06–U 0139–06–R	Pending
René Gagné v. Algoma University College Faculty Divisional Court No. 11–1764 **Ottawa**	0460–10–U	Pending
Greater Essex County District S.B. Divisional Court No. 403/11	1004–08–M	October 3, 2012
John McCredie v. OLRB et al Divisional Court No. 1890/11 **London**	1155–10–U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059–10–ES	Dismissed Jul 6/12
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	December 7, 2012
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953–07–ES	September 25, 2012
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786–09–ES	Dismissed Jun. 4/12; Reasons to follow

Case name & Court File No.	Board File No.	Status
Greater Essex Catholic District S.B. Court of Appeal No. C54934	3122–04–G	Appeal Dismissed July 10, 2012
John McKenney v. Upper Canada District S.B. Court of Appeal No. M41065 **Ottawa**	2687–08–U	Dismissed Feb. 3/12; Seeking leave to appeal to C.A.
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10 Supreme Court No. 34915	3322–03–R 2118–04–R	Seeking leave to appeal to SCC
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Blue Mountain Resorts v. MOL Court of Appeal No. C54427	1048–07–HS 0255–08–HS	September 27, 2012
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999–07–ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Court of Appeal No. C55503	1776–04–R et al	November 8, 2012
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	Pending